SUPREME COURT, U. S.

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No. 450

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

LOGAN LANES, INC.,

*Petitioner,*

v.

BRUNSWICK CORPORATION,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

## BRIEF IN OPPOSITION

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Statute Involved | 1 |
| Question Presented | 2 |
| Statement | 2 |
| Argument | 5 |
| I. The Decision Of The Court Of Appeals Is Plainly Correct | 5 |
| II. There Is No Conflict Of Decisions | 9 |
| III. Petitioner's Claim That The Case Involves Other Discriminatory Sales Was Not Raised In The Court Of Appeals And Is In Any Event Without Merit | 11 |
| IV. Summary Judgment Was Properly Granted | 12 |
| Conclusion | 13 |


## TABLE OF CASES


| | |
|---|---|
| California v. Taylor, 353 U.S. 553, 557 n | 11 |
| Lawn v. United States, 355 U.S. 339, 362 n | 11 |
| People v. University of Illinois Foundation, 388 Ill. 363, 367, 370, 58 N.E.2d 33, 36-37 (1944) | 8 |
| Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962) | 12 |
| Students Book Company v. Washington Law Book Co., 232 F.2d 49 (C.A.D.C., 1955) | 9 |

## STATUTES

PAGE

Robinson-Patman Act, § 13c, 52 Stat. 446, 15 U.S.C. § 13c ..... 1-2, 5

Utah Statutes, Chapter 10-7, Section 63 ..... 2

## MISCELLANEOUS

H.R. No. 4452, 82nd Cong., 1st Sess. ..... 9

H.R. No. 3377, 83rd Cong., 1st Sess. ..... 9

House Report No. 2161, 75th Cong., 3rd Sess. ..... 5

Patman, The Robinson-Patman Act (1938) ..... 8

Patman, Complete Guide to the Robinson-Patman Act (1963) ..... 9

Senate Report No. 1769, 75th Cong., 3rd Sess. (1938) 5

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## BRIEF IN OPPOSITION

## STATUTE INVOLVED

The statutory provision involved is Section 13c of the Robinson-Patman Act, 52 Stat. 446 (1938), 15 U.S.C. § 13c, which reads as follows:

> "That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidis-

crimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

## QUESTION PRESENTED

Respondent Brunswick sold bowling equipment to Utah State University for use in its Student Union Building at lower prices than to petitioner, a private bowling operator in the same town. The only substantive question presented is whether the above quoted amendment to the Robinson-Patman Act applies when, although the Student Union bowling lanes are used principally for University purposes, the University also permits members of the public to bowl on them.

## STATEMENT

The facts of the case are not set forth in the petition for certiorari. They appear in the complaint and the affidavits and exhibits submitted in reference to respondent's motion for summary judgment. Petitioner has not challenged anything said in the summaries of the facts set forth in the opinions of the District Court and the Courts of Appeals appended to the petition.

In short, respondent Brunswick sold bowling lanes, automatic pinsetters, and related equipment to petitioner in 1959 at a higher price than to Utah State University for incorporation in its Student Union Building in 1964.[1]

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[1] The sale of the lanes and pinsetters to the University, through the State Building Board, was pursuant to a request for bids, as required by Utah Statutes, Chapter 10-7, Section 63. See R. 86-88; Ex. B.

Other bowling supplies were also allegedly sold to petitioner and the University on the same basis thereafter. Both petitioner and the University are located in Logan, Utah.

The bowling lanes are used by the University in its physical education program. Approximately 900 to 1,000 students annually enroll in bowling classes for which they receive credit. (R. 92, 94.) The bowling lanes also provide extracurricular recreation for students and faculty. (R. 92.) In addition, the University permits the general public to use its bowling facilities. All income from the Student Union bowling alleys is used to finance student activity programs, or goes into a fund for expansion and improvement of the University. (Pet. App. 3; R. 92-93.)

An affidavit submitted by the manager of the Student Union Building states that of 128,349 lines bowled between July, 1964, when the new lanes were installed, and March 31, 1966, 125,415 were bowled by students, faculty, staff and guests, and 2,934 were bowled by others. (Pet. App. 3; R. 94.) Affidavits submitted by petitioner confirm that the Student Union lanes were used by the public, without giving figures as to the proportion of such use, and also state that deponents believe that no effort was made at the Student Union to determine whether prospective customers were associated with the University. (Pet. App. 3; R. 55-64.)

Petitioner's amended complaint (R. 43) alleged that because the University paid less for its bowling equipment, it could and did charge lower rates to bowlers than petitioner, that petitioner had lost business because of the price discrimination, and that the discrimination in price was a violation of the Robinson-Patman Act. Damages of $200,000, trebled to $600,000, were sought. (R. 52.)

The District Court granted respondent's motion for summary judgment on the grounds both that the Robinson-Patman Act did not apply to sales to a sovereign state, and that the sales to the State University were in any event exempted from the Act by Section 13c. (Pet. App. 9-13.) The Court of Appeals affirmed on the latter ground. (Pet. App. 1-8.)

## ARGUMENT

### 1. The Decision Of The Court Of Appeals Is Plainly Correct.

The decision below clearly comports with the language of the 1938 amendment incorporated in Section 13c of the Robinson-Patman Act, which provides that the Act shall not apply to "purchase of their own supplies for their own use by . . . universities . . . not operated for profit." Indeed, the petition makes no effort to show that the words of the exemption are inapplicable.

The contention seems to be that, if the price discrimination in favor of a university causes substantial competitive injury to a private enterprise, the exemption does not apply. Nothing in the language of the statute, nor for that matter in the passages quoted on page 6 of the petition from the committee reports, supports that reading. These excerpts from the reports show an intent to exempt "eleemosynary institutions, as they are not operated for profit." See Sen. Rept. No. 1769, 75th Cong., 3rd Sess. (1938), as quoted on page 6 of the petition. Indeed the passage quoted (p. 6) from House Report No. 2161, 75th Cong., 3rd Sess., explains that the amendment was designed to insure "that favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institution, do not fall under the ban of the act." There is no suggestion that such "favors in price" were not to be allowed whenever a private competitor might be affected, so long as the institution was of the character—"charitable" and "non-profit"—covered by the amendment.

The colloquy in the 1935 hearing on the bill which became the Robinson-Patman Act of 1936, upon which the petition relies (Pet. 6), occurred three years *before* enactment of the amendment exempting purchases by universities.

Many charitable institutions whose purchases were exempted from the Robinson-Patman Act by the 1938 amendment engage in activities which compete to some extent with private enterprise. School dormitories may compete with private housing facilities; school rooms used in the evening for community meetings compete in certain communities with private meeting rooms; charitable hospitals may compete with other hospitals. On petitioner's theory, in these situations the school or hospital could not continue to obtain "favors in price" in sales of beds and other furniture for the dormitories and the hospitals, or of desks and chairs for the classrooms used in the evening for private meetings. If Congress had intended anything like that it would have put words to that effect in Section 13c instead of using language which does not permit of such a construction.

It may be noted that in transactions of this sort, the sale to the exempted institution may occur before the product is used in a way which might harm private competitors. It would neither be fair nor feasible to bar a seller from granting the charitable institution the discount validated by Section 13c because subsequently it appeared that a competitor was adversely affected by the way in which the product was used. To be specific, when the Utah State Building Board called for bids on bowling equipment to be installed in a State University building, Brunswick

would not have known whether the public generally would be permitted to use the facilities after they were installed.

The petitioner argues (p. 8) that its affidavits raised an issue of material fact, since they established that the University bowling "facilities were used by the general public", that they were not limited to the University's own people, but were operated in "direct competition with the facilities of petitioner." All this was admitted. As the Court of Appeals' opinion makes clear, the only area of factual dispute concerned the precise amount of public use of the University alleys. The affidavit of a University official indicated it was under three per cent. (R. 94). Petitioner's affidavits tended, at most, to show that "no effort was made at the Student Union lanes to determine which customers were members of the public and which were not." (Pet. App. 7.) The Court of Appeals properly found (Pet. App. 7-8) that since "the primary purpose of the purchases, established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff," "any additional use of the bowling facilities by the general public for a fee, even if such use is substantial, would not establish that the purchases were *not*[2] made for the use of the University." In view of the substantiality of University use, and the fact that the proceeds of use by others went "exclusively for University purposes," the Court of Appeals correctly con-

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[2] This word was inadvertently omitted from the opinion as quoted in the appendix to the petition, pp. 7-8.

cluded (Pet. App. 7-8) that the exact amount of bowling by other than University people was immaterial.[3]

The petition refers to the history of the original Robinson-Patman Act of 1936 (prior to the 1938 amendment) as demonstrating that sales to the government were to be exempt "only to the extent that the goods purchased were used by the government for its own purposes and not in competition with private concerns." (Pet. 6.) Since the Court of Appeals did not find it necessary to consider our argument that the Act was never intended to bar discounts to governments, we shall not dwell on the point here. It should be sufficient to cite Representative Patman, whose book (*The Robinson-Patman Act* (1938), p. 168) contained the following question and answer:

> "Question. If a manufacturer sells to government, municipal, or public institutions at a lower price than he sells to his wholesale customers, is he in violation of the law if he does not make the same price for the

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[3]Although state tax cases are obviously not controlling, *People* v. *University of Illinois Foundation*, 388 Ill. 363, 367, 370, 58 N.E.2d 33, 36-37 (1944), cited in the petition (p. 8), involves very similar facts, and clearly supports respondent's position rather than petitioner's. In that case the Student Union Building containing bowling alleys "occasionally used . . . by members of the public" was held exempt from taxation under a statute exempting property "used by such schools exclusively for school purposes", on the ground that the "primary" and not the "secondary or incidental use, is controlling." The petition errs in stating that the bowling alleys in the Illinois Student Union building were confined "exclusively to university personnel and educational purposes." Indeed, the three per cent "public use" of the Student Union facilities in Illinois (388 Ill. at 367) is almost identical with that of the University bowling alleys in the case at bar.

same quantity available to the wholesaler to whom he sells?

> "*Opinion.* The Attorney General of the United States has ruled that the Act does not apply to the government. (See Chapter 18.) It may be presumed that the Attorney General's reasons may also be applied to municipal, and public institutions."

Dissatisfied with this result, in 1951 and 1953 Representative Patman introduced bills (H.R. 4452, 82nd, Cong., 1st Sess., and H.R. 3377, 83rd. Cong., 1st Sess.) the stated purpose of which was:

> "To amend section 2 of the Clayton Act so as to make it applicable to discriminatory sales to the United States and to any State, or political subdivision thereof."

These bills would have amended the Act to provide:

> "That for the purpose of this section the term 'purchaser' includes the United States, any State or any political subdivision thereof."

The bills were never enacted. Thereafter in the 1963 edition of his book (entitled *Complete Guide to the Robinson-Patman Act*), Representative Patman gave substantially the same answer as he had in 1938 (p. 30).

Since Representative Patman, who was the principal legislative sponsor of the Robinson-Patman Act, would not likely have understated the Act's coverage, these manifestations of his understanding that the Act does not apply to sales to State governments are entitled to weight.

## II. There Is No Conflict Of Decisions.

The decision below does not conflict with a dictum in a footnote in *Students Book Company* v. *Washington Law Book Co.*, 232 F.2d 49 (C.A.D.C., 1955), the only other case

in 29 years which has interpreted Section 13c. The Court of Appeals for the District of Columbia there sustained a jury verdict that the Robinson-Patman Act had *not* been violated by the defendant, on the ground that campus book stores were not purchasers of law books but only agents to whom the books were consigned on a commission basis. Footnote 5, after quoting Section 13c, stated:

> "Although the appellee has sold books to all three of the universities for their own use, i. e., for their libraries, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions."[4]

Whereas in the *Students Book* case the books were not used by the university but sold at a profit to be used by others, here the bowling equipment was unquestionably sold to the University to be used as part of its physical education program. The record establishes that merchandise resold at the University alleys was not purchased from Brunswick. (R. 95.) The Court of Appeals correctly found the *Students Book* case distinguishable. Obviously there is no such disagreement between two circuits as to require resolution by this Court.

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[4] Nothing in the opinion of the Court of Appeals in the *Students Book* case supports petitioner's statement that the issue treated in footnote 5 was in any way affected by "a full development of the facts by discovery and jury trial". (Pet. 7.) The discussion of facts in the *Student Book* case was concerned entirely with the jury's determination of the sale-consignment issue.

## III. Petitioner's Claim That The Case Involves Other Discriminatory Sales Was Not Raised In The Court Of Appeals And Is In Any Event Without Merit.

The petition argues (p. 9) that the Court of Appeals ignored its claim that sales by Brunswick to others than the State University violated the Robinson-Patman Act. Petitioner presented no such question to the Court of Appeals. Its briefs below dealt only with sales to the University and the effect of this upon petitioner. Its main brief complained (p. 9) that appellee (Brunswick) sold at lower prices "to this competitor of appellant."

"Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 n. and cases there cited; *California* v. *Taylor*, 353 U.S. 553, 557 n. There is nothing exceptional here.

A fair reading of petitioner's amended complaint (including particularly paragraphs 7, 10, 12 and 13 cited on page 9 of the petition and found at R. 45-47) will demonstrate that petitioner was claiming injury from Brunswick's sales at a lower price only to "this competitor" or to "such competitor", in the singular, with obvious reference in context to the Student Union Building of the University. (R. 47.) And the affidavits submitted by petitioner in opposition to respondent's motion for summary judgment dealt only with the Student Union bowling lanes. (R. 55-64.) Thus, not only did petitioner's counsel fail to raise the point in the Court of Appeals, but in addition the point was not even raised on the record in the trial court.

The requests in petitioner's interrogatories (R. 18) for information as to respondent's prices in all other sales to customers in northern Utah and southern Idaho may con-

ceivably have been relevant to knowledge of respondent's price structure in the area, but that would not enlarge the cause of action pleaded. Petitioner's officers would have known if bowling alleys other than the State University lanes were charging lower rates and thereby injuring it competitively. They undoubtedly would have so stated in their complaint or affidavits, if they had believed that any such injury was caused by Brunswick's price discrimination. There was no such intimation in anything said by them or their counsel in the courts below.

Petitioner is now asserting that the Court of Appeals erred, because, unasked, it did not remand the case with directions to the trial court to permit the plaintiff discovery broader than the cause of action pleaded.

**IV. Summary Judgment Was Properly Granted.**

Petitioner quotes cases which say (Pet. 11-12) that summary judgments should be granted sparingly in "complex antitrust litigation". *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). But that policy does not apply to simple clear-cut cases such as this, where the material facts are undisputed and the case turns upon a narrow point of law. This is obviously *not* a case in which ". . . motive and intent play leading roles . . . and hostile witnesses thicken the plot". Cf. Pet. 11, quoting from the *Poller* case. Summary judgment is not to be precluded because of discovery demands which go far beyond anything the plaintiff has alleged in its complaint or asserted in its affidavits.[5]

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[5] None of the cases cited on pp. 11-12 of the petition involves the Robinson-Patman Act or issues as unencumbered by complex facts as is the case at bar.

Petitioner implies (p. 11) that the summary judgment deprived it of a jury trial. No jury trial was demanded, however, in the District Court.

## CONCLUSION

The decision below was plainly right. There is no conflict of decisions. Indeed, there seems to have been no difficulty in giving effect to Section 13c; the question here involved has not arisen in any other case during the 29 years since the Section was enacted. No reason for granting certiorari has been shown. The petition should be denied.

Respectfully submitted,

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